84-688

No. 84-——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CAROL JEAN VOSCH, executrix of the last will of Charles Lowry, deceased
DAVID GAIBIS and others similarly situated,
Petitioners,

v.

WERNER CONTINENTAL, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether certiorari should be granted in this case to decide whether individual union employees may bring a Section 301 action (29 U.S.C. § 185) against their employer to vacate a labor arbitration award which was violative of public policy without also alleging that their union breached its duty of fair representation.

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REFERENCE TO OFFICIAL REPORTS OF OPINIONS OF THE COURTS BELOW

1. District Court Opinion—*Gaibis* v. *Werner Continental, Inc.,* Civil Action No. 78-1211 (decided June 14, 1983), 565 F.Supp. 1538 (W.D. Pa. 1983).

2. Circuit Court Opinion—*Vosch* v. *Werner Continental, Inc.,* No. 83-5468 (decided May 14, 1984), 734 F.2d 149 (3d Cir., 1984).

JURISDICTION

Petitioners herein pray that a Writ of Certiorari be granted by this Court to review a determination of the United States Court of Appeals for the Third Circuit, made May 14, 1984, which reversed an Order of the United States District Court for the Western District of Pennsylvania, made June 14, 1983.

Petitioners filed a timely Petition for Rehearing In Banc with the Third Circuit which was denied on June 29, 1984.

Petitioners sought and received on October 1, 1984, an Order from this Court, through Associate Justice William J. Brennan, Jr., extending the time for the filing of this Petition until October 27, 1984.

Jurisdiction of this Court to review the determination of the United States Court of Appeals for the Third Circuit is given by 28 U.S.C. § 1254(1). This Petition is being made by the Plaintiffs in the cause below.

STATUTES INVOLVED

The statute involved in this case is Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. In relevant part that section reads as follows:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Petitioners, truck driver employees of the respondent, are members of Local 261, of the International Brotherhood of Teamsters. Following their suspensions and ultimately their discharges, Petitioners brought this action pursuant to 29 U.S.C. § 185 to vacate the grievance committee and arbitration decisions that upheld their suspensions and discharges.

On June 14, 1983, following years of litigation, the District Court found in favor of the Plaintiffs, Petitioners herein, held that the arbitration awards in question were in violation of public policy in that they violated the federal safety regulations found in Federal Motor Carrier Safety Regulations, ordered them vacated and ordered the Petitioners reinstated with full back pay.

On May 14, 1984, the United States Court of Appeals reversed the decision of the District Court holding that the employees failed to state a cause of action. This Petition follows that ruling.

Facts

Respondent Werner Continental is an interstate carrier, certificated by the ICC. It employs over-the-road truck drivers to haul its freight, Petitioners and their class are and were truck drivers, employees of Respondent. They are also members of Teamsters Local 261 of the International Brotherhood of Teamsters.

After a driver has returned to the W. Middlesex terminal after hauling a load and after his federally required eight hour rest period, Werner Continental

requires that he be continuously available for dispatch. Werner Continental has no regulated work week and cannot tell the driver when a dispatch can be expected. Because of the unpredictability of the system, "available" means waiting by their telephone literally 24 hours a day, seven days a week to be dispatched by the company for a load. The driver-employee, of course, has no way of knowing when the call might come in. He might wait by his phone for an hour, a day, or even several days before the call comes in.

If the Respondent Company calls the driver and he is not home, or if his line is busy for more than 15 minutes, he is then considered unavailable or *absent* and becomes subject to discipline. If the driver had waited all day and into the night for a call which never comes then lies down to sleep and the phone rings with a dispatch, he must take the load and is not permitted to then book off as *fatigued.* If he takes the load, and tries to pull over during his run because he is tired, he is disciplined for that as well.

Disciplining drivers for absenteeism under the above described dispatch and logging system violates Federal Hours of Service Safety Regulations (49 CFR § 395.8(a), 395.2(a) and 392.3), which define "off duty time," "on duty time," and deal with avoiding fatigue. Further, official interpretations of these regulations, make it clear that the dispatch and logging system of Petitioners accompanied by discipline of drivers up to and including discharge for violations thereof, clearly violates these safety regulations.

Discipline takes the form of warning, suspension or even discharge. This practice of Respondent takes

on even more frightening proportions inasmuch as the Respondent requires the drivers to log this time when they *must* be available as "off-duty" time. Thus, if the Respondent calls the Employee, who for example is at church or mowing the lawn, five times in an hour (which often occurs), this is considered five absences. This is so even if the employee had been home waiting for a call for hours or even days before he stepped out.

This accomplishes a two fold purpose for the company: first, the company need not pay its drivers while they are "off-duty", despite the fact that they are subject to discipline for being "absent" during this "off-duty" time. Second, if this time were logged as on-duty, which Petitioners contend it should, then this waiting time would count against the maximum number of hours that each driver is allowed by Federal law to log as "on-duty" during a particular time period. Thus, the log of a driver who may have been awake and by his phone for twenty straight hours before he is dispatched would reflect that he has had plenty of rest and is ready to drive. In reality, he may be totally exhausted when he steps into his vehicle and thus create a serious safety hazard for himself and the motoring public.

In addition, when the Respondent gets in touch with a driver, he is required to be ready to haul the load and be physically present within two hours. Thus, his ability to ever go any distance from home for whatever reason or to get a long sleep, is severely limited.

When the driver is disciplined for not being "available" during what is allegedly his own free off-duty

time (which the applicable Federal Regulations mandate to be time that a driver must be "free to pursue activities of his own choosing," and "completely relieved of all responsibility" to the Company, the discipline is considered to be for "absenteeism from work."

The two named Petitioners in this case, Gaibis and Lowry were discharged for "chronic and habitual absenteeism" because they missed phone calls while they were supposedly "off-duty" and "free to pursue activities of their own choosing."

Petitioner Gaibis, a Union Steward and Petitioner Lowry grieved these discharges and the discharges were upheld in the teamster-company grievance procedure.

The Petitioners, and not the Local Union, brought this action pursuant to Section 301, 29 U.S.C. § 185, alleging that these awards, which upheld the Company's practice of requiring drivers to stand by their phones in readiness for work 24 hours a day and to log this time as "off-duty", when it was in reality "on-duty" time, were violative of public policy in that they violated federal safety regulations promulgated by the (Federal) Bureau of Motor Carrier Safety.

The District Court agreed, found the awards to be violative of public policy, held that there exists a "public policy exception" to the finality rule of labor arbitration awards and ordered the awards vacated.

The Petitioners did not sue the Union alleging a branch of duty of fair representation. Nor did they rely simply on a theory of mere breach of contract as a basis for vacating the grievance awards.

During oral argument of this case in the Circuit, the Court raised the issue upon which it ultimately dismissed *sua sponte*. Despite the Respondent conceding that individual employees could bring such a suit by virtue of the allegations contained therein, the Appeals Court nevertheless reversed the District Court and ordered the Complaint dismissed.

In so doing, the Appeals Court essentially held that absent a claim by the employee that his or her Union breached its duty of fair representation, an employee could not bring a Section 301 action to vacate an arbitration award, even if the award were violative of public policy and required the employee to break the law.

ARGUMENT

Certiorari Should Be Granted in This Case To Decide Whether Individual Union Employees May Bring a Section 301 Action (29 U.S.C. § 185) Against Their Employer To Vacate a Labor Arbitration Award Which Was Violative of Public Policy Without Also Alleging That Their Union Breached Its Duty of Fair Representation.

Petitioners recognize the longstanding rule that the decisions of labor arbitrators and grievance committees are final and not subject to judicial review. *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). This rule, however, is not without exceptions.

As this Court wrote in *Enterprise Wheel and Car, supra,* at 597:

> ". . . an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own

> brand of industrial justice. He may of course look for guidance from many sources, yet *his award is legitimate only so long as it draws its essence from the collective bargaining agreement.* When the arbitrator's words manifest an infidelity to this obligation, *courts have no choice but to refuse enforcement of the award.* (emphasis added).

Since the time of *Enterprise Wheel, supra,* and the *Steelworkers Trilogy,* courts have recognized a number of exceptions to the rule of finality.

Perhaps the most important of these narrow, limited exceptions, is the one relied on in this case, the public policy exception where an award or the conduct which it upholds is inconsistent with public policy or requires a party to violate the law, it most certainly cannot be given finality by the Court; *Ludwig Honold* v. *Fletcher,* 405 F.2d 1123, at 1128 n.27 (3d Cir., 1969); *Teamsters* v. *Consolidated Freightways,* 464 F. Supp. 346 (W.D. Pa. 1979); *I.B.T.* v. *W. Pa. Motor Carriers, supra,* at 786 n.5; and *Banyard* v. *N.L.R.B.,* 505 F.2d 342 (D.C. Cir. 1974).

It is clear, therefore, that in most situations the award is final. And, it is even more of a certainty that an arbitration award cannot be set aside simply because it is alleged by the Employee or the Union that the employer's actions, such as in a discharge case, constitutes a mere breach of the labor contract. If an arbitrator, for example, chooses to believe the evidence of the Company that the Employee was sleeping on the job, the Court will never review such a decision merely on the basis of the Union's or Em-

ployee's allegation that the dicharged Employee was not sleeping on the job.

Although the concept of non-reviewability in the type of situation stated immediately above appears obvious, there is one occasion when such an arbitration can be reviewed. A simple allegation of breach of contract by an Employee under 301 will subject an arbitrator's decision to review without regard to the rule of finality if, as a part of that action, the Employee also alleges a breach by the Union of its duty to fairly represent the Employee. As this Court held in *Vaca* v. *Sipes,* 386 U.S. 171 (1967), many times thereafter, and most recently in *Delcostello* v. *I.B.T.,* —— U.S. ——, 103 S.Ct. 2281, 2290, it would be unfair to the Employee to apply the finality rule when he is essentially deprived of a fair hearing due to the Union's inadequate representation. Thus, actions alleging simple breach of contract can only survive if the employee also alleges a breach of duty by the union. This is the only time that the finality rule does not apply when the only claim is a mere breach of contract.

Actions seeking to vacate an arbitration award because the award violates public policy, or because the award was fraudulently obtained, or because it absolutely fails to draw its essence from the contract, or because the award was beyond the jurisdiction of the arbitrator, have never required an allegation of breach of duty. These type of 301 suits fit into the exceptions to the finality rule without the necessity of also alleging a breach of duty by the union. *I.B.T.* v. *Western Pa. Motor Carrier Assoc.,* 574 F.2d 783, 786 (3d Cir., 1978).

This is obvious in that most of the 301 suits referred to in the paragraph above are brought by the Union. This is only natural in that the Union, rather than the often discharged Employee, has the resources, both financial and legal to do so. And, it is also true that on most of the occasions when an Employee brings a 301 suit, the Employee also alleges that the Union breached its duty to fairly represent. This is also logical and understandable in that in most situations the Employee would rather have the Union bringing the suit, but is bringing it on his or her own precisely because the Union has, in one way or another, let him down and thus the Union is sued along with the employer.

There are no cases, however, aside from the panel's decision in the matter now before this Court, that prohibit an Employee from bringing a 301 action without alleging breach of duty by the Union, as long as the Employee sufficiently alleges a clear exception to the finality rule, such as the public policy exception. A simple allegation of breach of contract alone will not get the individual Employee *or* the Union into court, but such is not the case here.

This concept, i.e. the right of the individual Employee to bring a suit against the employer, was first recognized generally by this Court as early as 1962, in *Smith* v. *Evening News Assoc.,* 371 U.S. 195 (1962), and as recently as 1983 in *Delcostello, supra.* The 9th Circuit in addition, in *Christianson* v. *Pioneer Sand & Gravel,* 681 F.2d 577 (9th Cir., 1982), has also decided this issue squarely opposite to the Circuit's Opinion in this case.

It was this concept that was misunderstood by the panel in this case. The Appeals Court opinion erroneously held as they did, without any supporting authority, simply because prior cases seeking to vacate arbitration awards because of various exceptions to the finality rule happened to be brought by the Union, and not because any cases have held that the Union's serving a plaintiff was a requirement. *Vosch* v. *Werner Continental* (Circuit Opinion in this case), 734 F.2d 149, 154-155 (3d Cir., 1984).

The language in *UPS* v. *Mitchell,* 451 U.S. 56, 62 (1981), *Vaca* v. *Sipes, supra,* at 195-198, and *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 563, 567-569 (1976), which discusses the need for an Employee to allege breach of duty before he or she can prevail in a 301 suit, is only stated in the context of a 301 suit that simply alleges a mere breach of contract and not any of the exceptions to the finality rule. Clearly, as *Vaca, supra,* observes, a 301 suit brought by an Employee who alleges a simple breach of contract, cannot survive without an allegation of breach of duty by the Union as well. But no breach of duty allegation is required when the Employee sues under 301 alleging a specific exception to the finality rule, such as an award contrary to public policy.

This was made most clear in this Court's recent decision in *Delcostello* v. *I.B.T., supra.* There the ultimate issue decided was whether a six month statute of limitations akin to an unfair labor practice should govern 301 suits brought by an Employee where a breach of duty is also alleged. This Court ultimately held that the six month statute would govern acknowledging, as Petitioners herein assert, that

this is a different breed of lawsuit than a 301 suit resting on an exception to finality rule without involving a breach of duty theory.

In discussion by the Court leading up to its holding, it summarizes the law in this area by exactly stating the position of Petitioners herein at 103 S.Ct. 2290:

> [2, 3] It has long been established that an individual employee may bring suit against his employer for breach of a collective bargaining agreement. *Smith* v. *Evening News Assn.*, 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed.2d 246 (1962). Ordinarily, however, an employee is required to attempt to exhaust any grievance or arbitration remedies provided in the collective bargaining agreement. *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965); cf. *Clayton* v. *Automobile Workers*, 451 U.S. 679, 101 S.Ct. 2088, 68 L.Ed.2d 538 (1981) (exhaustion of intra-union remedies not always required). Subject to very limited judicial review, he will be bound by the result according to the finality provisions of the agreement. See *W. R. Grace & Co.* v. *Local 759*, —— U.S.——, at —— 103 S.Ct., ——, at——, 75 L.Ed.2d 1424 (1960). In *Vaca* and *Hines*, however, we recognized that this rule works an unacceptable injustice when the union representing the employee in the grievance/arbitration proceduce acts in such a discriminatory, dishonest, arbitrary, or perfunctory fashion as to breach its duty of fair representation. In such an instance, an employee may bring suit against both the employer and the union, notwithstanding the outcome or finality of the grievance or arbitration proceeding. (Citations omitted).

Stated simply, this Court in *Delcostello, supra,* recognized that individual employees can sue the com-

pany under § 301 to vacate an award without alleging breach of duty, even though it is difficult in that only narrow exceptions like public policy exist. However, when the employee *also* alleges breach of duty by the Union, he then can sue under § 301 by merely alleging a simple breach contract without need to allege an exception to the finality rule.

In *Hines, supra,* at 562, this view was also generally set forth:

> Section 301 contemplates suits by and against individual employees as well as between unions and employers; and contrary to earlier indications § 301 suits encompass those seeking to vindicate "uniquely personal" rights of employees such as wages, hours, overtime pay, and wrongful discharge. *Smith* v. *Evening News Assn., supra,* 371 U.S. at 198-200, 83 S.Ct., at 269-270.

Further, the seminal case in this regard, *Smith, supra,* is also directly supportive of Petitioners' position. There, this Court held as follows:

> The concept that all suits to vindicate individual employee rights arising from a collective bargaining contract should be excluded from the coverage of § 301 has thus not survived. The rights of individual employees concerning rates of pay and conditions of employment are a major focus of the negotiation and administration of collective bargaining contracts. Individual claims lie at the heart of the grievance and arbitration machinery are to a large degree inevitably intertwined with union interests and many times precipitate grave questions concerning the interpretation and enforceability of the collective bargaining contract on which they are based. To exclude these claims from the ambit of § 301

> would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law. This we are unwilling to do.
>
> The same considerations foreclose respondent's reading of § 301 to exclude all suits brought by employees instead of unions.

This logic is particularly applicable in situations like the instant matter where the individual seeks to assert rights personal to himself as opposed to an issue affecting the union as a whole.

Although few lower courts have had to deal with this specific issue, the 9th Circuit has. In so doing, that Court held that an Employee had standing to bring a 301 suit without alleging breach of duty against the Union. That Court held as follows:

> Absent the special consideration of preserving the finality of arbitration, that was present in *Mitchell,* we hesitate to apply Justice Stewart's suggestion that an employee must prevail against his union in order to make his claim against the employer for breach of a collective bargaining agreement. The respective breaches of duty by the union and the employer often may be wholly unrelated, and we see no reason why an employee's failure to prevail upon his claim of breach by one of the two should preclude recovery from the other. See *Vaca* v. *Sipes,* 386 U.S. 171, 195-98, 87 S.Ct. 903, 919-921, 17 L.Ed.2d 842 (1967); *Czosek* v. *O'Mara,* 397 U.S. 25, 29, 90 S.Ct. 770, 773, 25 L.Ed.2d 21 (1970). Such a rule would prove especially harsh where, as here, the employee has lost one of his claims, not on the merits, but on the basis of a statute of limitations. (*Christianson, supra,* at 580).

Although the Court in *Christianson, supra,* was dealing with a situation where the Union did not even take the matter to arbitration, the Ninth Circuit even goes further than Petitioners herein suggest is necessary. The *Christianson, supra,* Court implies that a mere breach of contract claim, without the necessity of alleging one of the narrow exceptions to the finality rule, such as public policy, would be a sufficient basis for an individual employee to get into Court.

In the instant matter, Petitioners ask this Court to grant certiorari to decide only the question of whether an individual employee can bring suit under Section 301 of the Labor Act, 29 U.S.C. § 185, to vacate an arbitration award that is violative of public policy, without having to sue the Union for breaching its duty of fair representation. This is a narrow yet vitally important question which Petitioners contend is already the law of the Court or, in the alternative should be clarified and made to be the law.

No legitimate policy reason exists to justify this arbitrary exclusion by the Appeals Court of the Employee's right to sue pursuant to Section 301.

Where the Employee sues without alleging breach of duty, he can only survive summary judgment much less prevail on the merits, if he sufficiently pleads one of the few very narrow exceptions to the finality rule.

What possible justification can there be in refusing to allow an individually aggrieved Employee to sue in order to vacate grievance decisions which, as in

the instant case, uphold the Employer's right to force his Employees to break the law, which violate important federal safety regulations designed to protect the public as well as the Employees, and which, therefore, are violative of public policy.

The very small number of such cases brought by individual Employees prior to the lower court's *first of its kind* opinion, speaks for itself as evidence that the proverbial floodgates will not be opened. What Petitioners herein seek this Court to reaffirm has always been the law, yet the floodgates nevertheless remain barely ajar.

To be sure, as observed earlier herein, many cases, ranging from *Vaca* v. *Sipes,* 386 U.S. 171 (1967), to *Findley* v. *Jones Motor Freight,* 639 F.2d 953 (3d Cir., 1981), discuss the need for individual Employees challenging grievance awards to prove a breach of the duty on their Union's part. In every one of those cases, however, the Courts recognized that Plaintiff's underlying claim against the employer was a simple breach of contract claim based upon the collective bargaining agreement. None of the basic duty of fair representation cases involved public policy attacks on grievance awards.

At best, then, any argument that Plaintiffs in public policy cases must prove a breach of the Union's duty of fair representation, is an argument by analogy only. After all, an Employee who has lost a grievance and who subsequently attacks the grievance award as violating public policy, when viewing the matter in a simplistic way, is not a very different position from an Employee who has lost a grievance and attacks the award as being simply a violation of

the collective bargaining agreement. The ultimate relief sought is the same, and the two claims can even be asserted in the same action. On the surface, it is tempting to conclude as the Circuit did in this case, that if proof of a Union's breach of the duty of fair representation is required in one case, it should also be required in the other.

Unfortunately, such a conclusion is seriously flawed. It focuses on the superficial similarities in the positions of the Plaintiffs, and ignores the much more significant differences in the purposes, and the very natures, of the two types of challenges to grievance awards. When a Plaintiff is simply claiming that his or her employer breached the collective bargaining agreement, a number of major policies, basic to the scheme of modern labor law, counsel against allowing the Employee unfettered access to the courts in order to sue the employer. These policies and principles, as discussed in *The Steelworkers Trilogy (United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp., supra), Vaca* v. *Sipes, supra,* and *Hines* v. *Anchor Motor Freight, supra,* include the notion that contract grievance machinery is at the heart of industrial self-government; that the parties to a collective bargaining agreement have bargained for an arbitrator's (or grievance committee's) interpretation of their agreement, not a court's; that Unions, as the exclusive representatives of their bargaining units, have an interest in controlling the presentation of grievances; and that the parties' motivation for establishing grievance procedures would be undermined if grievance deci-

sions were subject to frequent and broad judicial review. All of the policies arguably militate against Employee access to the courts over *ordinary contract disputes*, unless the Employee can first prove that the grievance process "has fundamentally malfunctioned by reason of the bad-faith performance of the Union"—*i.e.*, a breach of the duty of fair representation. *Hines* v. *Anchor Motor Freight, supra,* 424 U.S. at 529.

None of these policies and principles, however, require the proof of such a breach of duty when the Employee is challenging the grievance award as violating public policy. Nor has this Court ever so held. For example, no court has ever suggested that industrial self-government entails the right to enter into contracts which violate the law, or the right to enforce otherwise legal contracts in an illegal manner. On the contrary, public policy challenges to grievance awards are designed precisely to prevent such conduct. *See, e.g., Permaline Corp.* v. *Painters Local 230,* 639 F.2d 890, 895 (2d Cir., 1981).

Similarly, public policy challenges to grievance awards do not undermine the parties' preferences for arbitrators or grievance committees as the final interpreters of their collective bargaining agreements. When a court vacates a grievance award as contrary to public policy, it is not reinterpreting the contract; it is simply holding that the contract, as interpreted by the arbitrator or grievance committee, or the actions of the employer, violate public policy.

The strength of Petitioners' argument is greatly increased by virtue of the fact that it is the *public policy* exceptions to the finality rule that forms the

basis of Petitioners' Complaint in this case and was crux of the District Court's opinion holding for Petitioners. Here, where the employer is requiring its Employees to violate federal safety regulations and to drive in a dangerously fatigued manner, much more than a simple question of breach of contract is involved, particularly when the grievance committee upholds this unlawful conduct. In such situations, not only are the Union, the Company, and the individual aggrieved Employee affected, but the public as well. In this particular case, the safety of all motorists is at stake. As the Second Circuit held in *Permaline Corp.* v. *Painters Local 230,* 639 F.2d 890, 895 (2d Cir., 1981), "If . . . the award in question is contrary to law or public policy, it is open to, indeed it is incumbent upon, the Court to step in."

And as the Ninth Circuit held in *Work Airways, Inc.* v. *Teamsters Airline Division,* 578 F.2d 800, 803-4, n.8, in another case where an award inconsistent with public policy was vacated, "we are concerned . . . with the safety of the air-traveling public, who are not parties to the [collective bargaining agreement] and are unable to participate in the selection of the arbitrator".

This Court in *Barrentine* v. *Arkansas-Best,* 450 U.S. 728, at 742 (1981) recognized that there are times when a Union, without being guilty of breaching its duty, might sacrifice a meritorious grievance. There, this Court held that: "Even if the Employee's claim were meritorious, his Union might, without breaching its duty of fair representation reasonably and in good faith decide not to support the claim vigorously in arbitration . . . [A] Union balancing individual and collective interests might validly per-

mit some Employees' [interests] . . . to be sacrificed if [it] . . . would result in increased benefits in the bargaining unit as a whole." *Barrentine* v. *Arkansas-Best Freight System, supra.* See also *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 58 n.19 (1974). Where this type of balancing on the part of the Union's results in grievance awards violative of public policy, the Unions and employers obviously have no incentive to challenge the awards themselves, and the public interest will remain undefended unless individual Employees are permitted to raise these challenges themselves independent of any fair representation claims they may have.[1]

In fact when the actions of employers toward their employees are violative of public policy, some courts

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[1] The Appeals Court in its opinion referred to *Rothlein* v. *Armour & Co.,* 391 F.2d 574, 579 (3d Cir., 1968) which, following the teachings of *Smith* v. *Evening News, supra,* held that an Employee could sue on his own if he could show the arbitration to be a "sham or is substantially inadequate or unavailable." The panel in this case then held that such a situation is not here alleged. First, it should be noted that the *Rothlein, supra,* case was decided before the Third Circuit had even recognized the public policy exception.

Further, there is only a very subtle distinction between a grievance procedure that is "substantially inadequate" and a grievance procedure that produces an award violative of public policy. This is particularly true in this case where the teamster grievance procedure was involved, a procedure often questioned for its fairness by Courts and legal scholars. See *General Drivers* v. *Young & Hay Transportation,* 522 F.2d 562, 567 n.5, (8th Cir., 1975), and citations contained therein; and *Azoff, Joint Committees as an alternative form of arbitration under the NLRA,* 47 Tulan L. Rev. 325 (1973). Can such a narrow and arbitrary distinction be sufficient to cut off an individual's capacity to sue?

have been so concerned that courts have recognized *tort* actions for wrongful discharge in violation of public policy in a non-employee at will situation and where the discharge was upheld in arbitration. *Garibaldi* v. *Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir., 1984). In *Garibaldi, supra,* although the *individual employee's* Section 301 count was dismissed because of a statute of limitations problem, the Ninth Circuit allowed the Plaintiff to proceed on a *tort* theory by virtue of the public policy allegations.

Petitioners respectfully request that this Court grant certiorari to clarify and decide this most important issue. Petitioners suggest that this can be done either because the Third Circuit has decided this case in conflict with the applicable decision of this Court or because a conflict exists among the Circuits.

Clearly, however, if this Court does not agree that its decisions cited herein from *Smith* v. *Evening News, supra,* through *Delcostello* v. *I.B.T., supra,* conflict with the Circuit's Opinion, the issue, then, is one that should be settled by this Court in that without question no decision of this Court agrees with the Circuit's Opinion herein.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 83-5468

CAROL JEAN VOSCH, executrix of the last will of
Charles Lowry, deceased
DAVID GAIBIS and others similary situated
Appellees

v.

WERNER CONTINENTAL, INC.,
Appellant

On Appeal from the United States District Court for the Western District of Pennsylvania

C.A. No. 78-1211

Argued March 2, 1984

Before: ADAMS AND SLOVITER, *Circuit Judges,*
and KELLY, *District Judge**
(Filed May 14, 1984)

RONALD A. BERLIN
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Attorneys for Appellees

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* Honorable James McGirr Kelly, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

FRANCIS M. MILONE (Argued)
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OPINION OF THE COURT

ADAMS, *Circuit Judge.*

David Gaibis and Charles Lowry were employed as over-the-road drivers by Werner Continental, Inc. (Werner) at its break-bulk terminal in West Middlesex, Pennsylvania. Werner, a freight carrier certified by the Interstate Commerce Commission (ICC), was acquired in January 1979 by Hall's Motor Transit Company (Hall's).

After having been dismissed from their jobs for "chronic and habitual absenteeism," Gaibis and Lowry brought suit under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1976), and the Fair Labor Standards Act, 29 U.S.C. § 216 (1976). The plaintiffs asked that three grievance awards affirming their dismissal be set aside and that Hall's be enjoined from requiring its drivers to comply with the company's dispatch system. The district court granted this relief, and Hall's filed a timely notice of appeal.[1] Because the complaint did not state a cause

[1] The district court denied plaintiffs' claim under the Fair Labor Standards Act. It held that plaintiffs had not properly stated a claim under the minimum wage regulations and that Hall's was exempt from the maximum hours regulations by virtue of the authority vested in the Secretary of Transportation to prescribe rules governing interstate transportation under 49 U.S.C. § 304 (1976). *Gaibis v. Werner Continental,* 565 F. Supp. 1538, 1552 (W.D. Pa.

of action upon which relief may be granted, we must now vacate the judgment of the district court.

I

Freight loads are dispatched from Hall's West Middlesex complex as they become available. Hall's drivers receive their assignments by way of a telephone dispatch system that must meet the Federal Motor Carrier Safety Regulations (FMCSR's) governing driving hours and rest periods of interstate drivers. These regulations are promulgated by the Federal Highway Administration (FHA) of the Department of Transportation and are administered by the FHA's Bureau of Motor Carrier Safety (BMCS).[2]

Under the FMCSR's, 49 C.F.R. § 395.1 *et seq.* (1982), drivers must maintain an hour-by-hour log and must attribute their time to one of four categories:

1) Off-duty time (the driver is not on duty and is not required to be ready for work);

2) Driving time (the driver is at the controls of a motor vehicle in operation);

1983). The district court did not address the assertion in the complaint that the dispatch system and the arbitration awards "smack of involuntary servitude" in violation of the Thirteenth Amendment to the Constitution of the United States. On appeal, Gaibis and Lowry have not pressed the Fair Labor Standards claims or the constitutional issue.

[2] The ICC has the duty under 49 U.S.C. § 304 (1976) to issue safety regulations governing the interstate transportation of goods by motor carriers. That duty was transferred to the Department of Transportation, which delegated the authority to issue safety regulations to the FHA. *See* 49 U.S.C. § 1655 (1976); 49 C.F.R. § 301.60 (1982).

3) On-duty/not-driving time (all time other than driving time from the time a driver begins work or is required to be ready for work until he is relieved from work and responsibility for performing work); and

4) Sleeping berth (a category not relevant to this litigation).

The federal safety regulations require that drivers be given eight hours of off-duty time after ten hours of driving time or fifteen hours of on-duty time. Under its dispatch system, Hall's may inform a driver by telephone that a load is available any time after the completion of the statutory rest period. Because the demand for freight services is unpredictable, a telephone dispatch may come at any time. Hall's directs its drivers to log time awaiting telephone dispatch as "off-duty." They are not paid for this time and are subject to discipline if they log the waiting period as "on-duty/not-driving."

Dispatchers at the Middlesex terminal maintain "log audit cards," on which a notation is made whenever a dispatcher fails to reach a driver who has completed the required rest period. Missed calls can lead to progressively more severe forms of discipline, ranging from a letter of reprimand to dismissal in cases of "chronic and habitual absenteeism."

II

In November 1977, Gaibis, in his capacity as union steward, filed a grievance, pursuant to the industry-wide collective bargaining compact, the National Master Freight Agreement (NMFA). He alleged that he and is colleagues had been required under peril of discipline to be constantly available for dispatch upon completion of the statutorily mandated rest period. He also asserted that Werner required its drivers to log the time awaiting dispatch as

off-duty, even though under federal regulations this time should be logged as compensible on-duty/not-driving time.

Gaibis' grievance was heard by the Western Pennsylvania Teamsters and Employees Joint Area Committee (WPJAC), a panel established under the NMFA. After that Committee became deadlocked Gaibis appealed to the Eastern Conference Joint Area Committee (ECJAC), the second stage of the NMFA grievance proceedings. The ECJAC dismissed Gaibis' complaint, asserting that the grievance was improperly before the committee.

In January 1978, Werner suspended Lowry for three days without pay; Lowry had been, in the company's view, unavailable for dispatch because he was not at home and ready to receive a dispatch on several occasions while off-duty. The WPJAC reached a deadlock on the grievance Lowry filed to protest this suspension. The union local joined Lowry in this protest and in the subsequent appeal to the ECJAC, which held that Lowry had been suspended for just cause.

Gaibis and Lowry filed a complaint in the district court in October 1978. Hall's discharged Lowry in January 1979 for "chronic and habitual absenteeism."[3] The union filed a grievance with the WPJAC, which reinstated Lowry without back pay and ordered the union and Hall's to modify the procedure by which drivers are notified of work opportunities. In March 1979, Lowry was again discharged for chronic and habitual absenteeism. Once again Lowry and the union resorted to the grievance procedure. An arbitrator ordered that Lowry be reinstated, but without back pay. In December 1979, Lowry was discharged for a

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[3] Dismissal for chronic and habitual absenteeism is sanctioned by the NMFA, which also establishes a grievance procedure by which a driver who believes that he has been unfairly disciplined can bring his claim to arbitration.

third time for chronic and habitual absenteeism. This time an arbitrator upheld the discharge.

In May 1980, Gaibis was discharged for chronic and habitual absenteeism. The union filed a grievance on Gaibis' behalf, claiming that his discharge violated the collective bargaining agreement and federal regulations. The WPJAC upheld the discharge without issuing an opinion.

Before the district court, Gaibis and Lowry asserted that Hall's dispatch procedure violates public policy, the United States Constitution, and several federal laws and safety regulations. They complained that the decisions of the grievance committees and the arbitrators upholding their discharges also violated public policy and were in addition arbitrary, capricious, and contrary to the NMFA.

III

In response to defendants' motion that the dispute be referred to the Bureau of Motor Carrier Safety (BMCS), the district court ruled that the Bureau had "primary jurisdiction" over certain questions of transportation practice and policy raised by the complaint filed by Gaibis and Lowry.[4] The court referred the matter to the BMCS to determine, among other things, whether Hall's logging and dispatch system violated the Federal Motor Carrier Safety Regulations.

After conducting a hearing, an Administrative Law Judge determined that Hall's dispatch and logging system

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[4] Primary jurisdiction is a judicially crafted doctrine which allows for preliminary review by specialized administrative agencies of claims raised before federal courts. *See* Cheyney State College Faculty v. Hufstedler, 703 F.2d 723, 736 (3d Cir. 1983).

did not infringe the BMCS hours-of-service regulations. *See* 49 C.F.R. § 395.2(a) (1982). He did find, however, that the system transgressed federal safety regulations, specifically FMCSR 392.3, by not allowing drivers to "book off" at the time of dispatch, that is, to decline an assignment because of fatigue.[5]

The FHA's Associate Administrator for Safety formally reviewed the ALJ's Recommended Decision. *See* 49 C.F.R. § 386.38(g)(1982). He agreed with the ALJ that Hall's dispatch system, and specifically the requirement that drivers log time awaiting dispatch as off-duty, did not violate the maximum hours provisions of the FMCS regulations. Unlike the ALJ, however, the Associate Administrator found that the dispatch system was sufficiently flexible for drivers to obtain adequate rest during their off-duty time. He held that the dispatch procedure and the disciplinary system complied with federal safety regulations and that Hall's did not knowingly dispatch fatigued drivers.[6]

The dispute then returned to the district court, which concluded that it was not bound by decisions rendered

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[5] FMCSR 392.3 requires that:

> [n]o driver shall operate a motor vehicle, and a motor carrier shall not require or permit a driver to operate a motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him to begin or continue to operate the motor vehicle.

49 C.F.R. § 392.3 (1982).

[6] BMCS records indicate that Hall's accident rate is well below the national average for carriers of a similar size. In 1979, Hall's drivers had 0.425 accidents per million miles travelled. The average for common carriers with fleets comparable to Hall's was 1.406 accidents per million miles. App. 409.

through an administrative process since the litigation turned entirely on a legal question, namely the construction of BMCS regulations. *Gaibis, supra,* 565 F. Supp. at 1548. The district judge held that requiring a driver to log time spent awaiting dispatch as off-duty abridged the plain meaning of the regulations governing work hours. He also found that Hall's dispatch system violated federal safety regulations by forcing fatigued drivers onto the road. The district court vacated the arbitration awards, reinstated the plaintiffs as employees of Hall's, and ordered that they be compensated for lost wages. The district court also enjoined further use of the current dispatch system and directed Hall's to establish a new procedure that conformed to certain conditions specified in the court's judgment.

IV

Given the procedural complexity of the matter before us, we will first turn our attention to the complaint filed in the district court and to the claims for relief asserted therein.

A

Gaibis and Lowry's complaint as amended appears to seek relief directly under the FMCS regulations and § 304 of the Interstate Commerce Act, 49 U.S.C. § 304 (1976).[7] Section 304 of the Interstate Commerce Act establishes the authority of the ICC (and now the BMCS), *see* note 3 *supra,* to regulate the maximum hours of employee service and the operational safety of motor carriers. The FMCS

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[7] In 1978, Congress began to revise and re-codify the Interstate Commerce Act. Section 304 has been repealed, and its several provisions now appear in various portions of Title 49. The revision does not affect the substance of old § 304 in any way relevant to this litigation.

regulations have been promulgated pursuant to that statutory grant of authority. Section 304 does not on its face, however, authorize an action brought in federal court by an individual to challenge a practice that is at odds with that section or the FMCS regulations.

Private enforcement of the Interstate Commerce Act is governed by 49 U.S.C. § 11708a (Supp. IV 1980), which allows an individual injured as a result of a "clear violation" of certain sections of Title 49 to bring a civil action to enforce those portions of the Code that have been violated. The statutory provisions whose enforcement may be the subject of a private suit, however, deal generally with the issuance of operating certificates and permits, rather than the promulgation of safety regulations. *See Baggett Transp. Co. v. Hughes Transp., Inc.*, 393 F.2d 710 (8th Cir.), *cert. denied*, 393 U.S. 936 (1968). Congress, then, has not included § 304 among those sections whose abridgement may properly lead to a private suit under § 11708.[8] *Accord Hamper v. Transcon Lines Corp.*, 425 F.2d 1178, 1179 (10th Cir. 1970).

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[8] *See* H.R. Rep. No. 253, 98th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Ad. News, 2923, 2931 (quoting S. Rep. No. 1588, 87th Cong., June 15, 1962) ("No district court is to entertain any action except where the act complained of is openly and obviously for-hire motor carriage without authority under the sections enumerated above. . . .").

Gaibis and Lowry have not specifically asked this Court to find an implied right of action under § 304. We note, however, that the key to determining the existence of an implied remedy is "the intent of the Legislature." Middlesex County Sewerage Auth. v. Nat'l Sea Clammers, 453 U.S. 1, 13 (1981). The legislative history just cited makes clear that the Congress' intent was to specify a certain few sections of the Interstate Commerce Act, whose violation could be redressed by an individual bringing suit in district court.

B

The parties to this appeal argue that Gaibis and Lowry have properly stated a cause of action under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1976), which provides for suits by and against labor organizations for violations of collective-bargaining agreements.[9] We cannot agree.

Like so many collective-bargaining contracts, the NMFA contains a set of procedures for settling disputes through a grievance process culminating in arbitration. Congress itself has declared that the best method for resolving grievances between employers and employees represented by a union is the procedure to which the parties themselves have agreed. *United Steelworkers of America v. Am. Mfg. Co.*, 363 U.S. 564, 566 (1980). The Supreme Court has declared that this congressional policy may be effectuated only if courts defer to the tribunals contractually designated to settle disputes. *Hines v. Anchor Motor Freight*, 424 U.S. 554, 562-63 (1976).

With the full support of their union, Gaibis and Lowry brought their claims to arbitration. In this appeal they ask us to affirm the judgment of the district court that the arbitral decisions should be overturned. However, some of the same considerations that undergird the policy of requiring aggrieved employers and employees to avail themselves of contractually specified arrangements also limit

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[9] Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185 (1976).

appeals from arbitral decisions by disappointed grievants. Employees may appeal an adverse decision under § 301 if they can show that their union breached its duty of fair representation, that is, that the union's conduct was arbitrary, discriminatory, or in bad faith. *Vaca v. Sipes*, 386 U.S. 171, 186, 190 (1967); *Rothlein v. Armour & Co.*, 391 F.2d 574, 578-79 (3d Cir. 1968). Employees may also have their claim heard in a federal court under § 301 if the grievance procedure was a "sham, substantially inadequate or substantially unavailable." *Castaneda v. Dura-Vent Corp.*, 648 F.2d 612, 619 (9th Cir. 1981) (quoting *Harris v. Chemical Leaman Tank Lines, Inc.*, 437 F.2d 167, 171 (5th Cir. 1971)).

Gaibis and Lowry do not challenge the fairness or adequacy of their union's representation in the arbitration procedure, nor do they impugn the integrity of the arbitration process. Their union did not join the suit in district court and was not named as a party to the proceeding. We are constrained to conclude that the plaintiffs did not state a cause of action under § 301.[10]

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[10] Appellants urge upon us a number of cases overturning arbitral awards that were inconsistent with public policy. While we agree that such inconsistency is a legitimate ground for upsetting an arbitral decision, we note that in each of the cases cited the trial court properly exercised jurisdiction in that one of the parties was a labor organization or the plaintiff alleged a violation of the duty of fair representation, or the collective bargaining agreement did not create a grievance mechanism. *See, e.g.*, Smith v. Evening News Assoc., 371 U.S. 195 (1962) (grievance mechanism); Wyatt v. Interstate & Ocean Transport Co., 623 F.2d 888 (4th Cir. 1980) (fair representation); General Teamsters v. Consol. Freightways, 464 F. Supp. 346 (W.D. Pa. 1979) (union as party).

IV

Although much has occurred since Gaibis and Lowry filed their original complaint, we cannot ignore the fact that the plaintiffs have not stated a cause of action upon which relief may be granted.[11]

Accordingly, the judgment of the district court will be vacated and the matter will be remanded to the district court so that it may be dismissed for failure to state a cause of action.

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[11] This is not to say that Gaibis and Lowry had no forum in which their objections to Hall's dispatch and logging procedure could have been heard. Under 49 C.F.R. § 386.12 (1983), it would appear that they could have filed a complaint with the Associate Administrator of the FHA, who is required to issue a notice of investigation, unless he determines that the complaint is meritless. Since the issue is not properly before us on this appeal, there is no occasion to speculate about the authority of a federal district court to review an FHA decision that a complaint is without merit.

After argument had been heard on this appeal, the Court granted a motion substituting Carol Jean Vosch, executrix of the last will of Charles Lowry, as appellee.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 78-1211

(Opinion filed June 14, 1983)

DAVID GAIBIS, CHARLES LOWRY,
and all others similarly situated,
Plaintiffs,

vs.

WERNER CONTINENTAL, INC.
Defendants.

OPINION AND ORDER

Plaintiffs David Gaibis and Charles Lowry and all others similarly situated are or were employed as over-the-road drivers by Werner Continental, Inc. at its West Middlesex, Pennsylvania terminal. Defendant Werner Continental, Inc., is an ICC certified freight carrier engaged in interstate commerce. Werner was acquired on January 1, 1979, by Hall's Motor Transit Company, another certified interstate carrier. Plaintiffs commenced this action pursuant to the provisions of Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, et seq., and the Fair Labor Standards Act, 29 U.S.C. § 216, seeking to: 1) set aside and vacate three grievance awards, 2) enjoin the defendant from requiring its drivers to comply with the current dispatch and logging procedure under the threat of discipline, and 3) have plaintiffs compensated for all lost wages and damages suffered due to defendant's illegal dispatch procedures.

On April 27, 1981, this Court entered an order requesting the assistance and input of the Bureau of Motor Carrier Safety, Dept. of Transportation (BMCS) in resolving the issues raised in this litigation. The Court determined that the BMCS had primary jurisdiction with respect to the issues of transportation practice and policy involved in the pending civil action and certified the following question for investigation and resolution in accordance with its rules of practice and procedure:

> Whether the dispatch and logging procedure followed by Hall's Motor Transit Company for its over-the-road drivers at its West Middlesex, Pennsylvania terminal violates the Federal Motor Carrier Safety Regulations, 49 C.F.R., § 390.1, et seq.

The matter is now before this Court after having been presented to an administrative law judge, who after considering the arguments of counsel and the evidence presented, entered findings of fact and conclusions of law. A reviewing official, namely, the Associate Administrator for Safety of the Federal Highway Administration in the Department of Transportation, then rendered a final decision. The court previously entered an order directing that the pending motion of Defendant Werner Continental, Inc. to Dismiss Plaintiffs' Second Amended Complaint, be treated as a Motion for Summary Judgment pursuant to Rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure. After argument by counsel before this Court, and the Court's review of the briefs submitted, the transcripts of the administrative proceedings, the Recommended Decision of the Administrative Law Judge and the Final Decision of the Associate Administrator, the Court will adopt the administrative law judge's findings of facts with minor changes and will make its own conclusions of law.

Findings of Fact

Plaintiff David Gaibis and Charles Lowry are individuals employed as over-the-road drivers by Defendant Werner Continental, Inc., at its West Middlesex, Pennsylvania terminal. The Plaintiffs at all relevant times have been members of Teamsters Local Union 261 (hereinafter the Union), a labor organization which has been the exclusive bargaining agent of the Plaintiffs in their employment relationship with Defendant Company in its operation at West Middlesex, Pennsylvania. The collective bargaining relationship between the Defendant and the Union was governed during the period from April 1, 1976 to March 31, 1979 by the National Master Freight Agreement and Teamsters Joint Council No. 40 over-the-road supplement agreement (hereinafter "NMFA").

Defendant Werner Continental, Inc., a trucking company certified by the Interstate Commerce Commission as an interstate common carrier of general commodity cargo, was acquired on January 1, 1979, by Hall's Motor Transit Company, another certified interstate carrier. During the entire period from 1975 to date, Werner continental, Inc., and its successor, Hall's Motor Transit Company, operated a truck terminal in West Middlesex, Pennsylvania. The combined trucking companies will be referred to hereafter as "Hall's." Any reference to "Hall's" may be taken to include the operations of Werner Continental, Inc. prior to January 1, 1979, unless otherwise specified.

Freight loads are dispatched from West Middlesex, day and night, on a sporadic basis reflecting the competition which exists among truckers to provide a fast and reliable service despite an unpredictable demand. Since Hall's operation requires that a driver be available to take to the road as soon as a load to a specific location materializes, over-the-road truck driving from the Middlesex terminal is not a 9 to 5 job with a fixed starting and quitting time.

The dispatch of the over-the-road drivers by Hall's from West Middlesex is governed not only by the nature of the trucking business, but also by the requirements of federal safety regulations which regulate the driving hours and the rest periods of interstate road drivers. These federal safety regulations, known as the Federal Motor Carrier Safety Regulations (hereinafter sometimes referred to as "FMCSR" with citation to §§ 395 to 395.13 of 49 CFR), were promulgated by the Federal Highway Administration (hereinafter "FHA") of the Department of Transportation, and are administered by FHA's Bureau of Motor Carrier Safety (hereinafter "BMCS").

Under the regulations pertaining to the hours of service of interstate road drivers, FMCSR §§ 395.1 to 395.13, the drivers are required to maintain an hour-by-hour log for every day of the year, whether they are working or not. In this log, the driver's time must be attributed to one of the following functions that would be relevant in this case:

"Off-duty time"—when the driver is not on duty, not required to be in readiness for work, and not under any responsibility for performing work.

"Driving time"—the time when a driver is at the driving controls of a motor vehicle in operation.

"On-duty not driving"—all time other than driving time from the time a driver begins to work or is required to be in readiness for work until he is relieved from work and responsibility for performing work.

The significance of the daily log derives from the requirement in FMCSR § 395.3(a)(1) and (2) that a driver must be given eight consecutive hours of off-duty time. Moreover, according to FMCSR § 395.3(b), a driver is not permitted to be on duty more than a total of 60 hours in any seven consecutive day period, or more than 70 hours in any eight consecutive day period. Because of this regula-

tion, it is of crucial importance how drivers log their off duty time. If off duty time is improperly logged as either "on duty" or "on duty not driving" then the trucking company and the drivers almost certainly would be in violation of the regulations since drivers who have been on duty too long would have been illegally dispatched. Finally, FMCSR § 395.8(a) provides that a driver who incorrectly logs his time in subject to criminal prosecution, as is a carrier who instructs a driver to log his time improperly.

There is no dispute that Hall's allows West Middlesex drivers a 10 hour rest period (or two hours more than the mandatory rest period) following 10 hours of driving time or 15 hours of on-duty time.

There is also no dispute that after the mandated 10 hour rest period is over and the driver still has at least 22 hours of "on duty" time available, a driver assigned to the West Middlesex terminal is considered to be "in service" and must be available in some form to receive a telephone dispatch call 24 hours a day. Hall's however, has not told its drivers that they must be available personally to receive a telephone dispatch call.

After receipt of a telephone dispatch call, the industry-wide collective bargaining agreement and the company's work rules provide that a driver must report to the West Middlesex terminal within two hours.

Drivers at the West Middlesex terminal are directed by Hall's to log the time while they are awaiting a telephone dispatch call as "off-duty". They are not paid for this time, and drivers who have attempted to log the waiting period as "on-duty not driving" have been warned about possible discipline, or actually have been disciplined by the company.

As long as a driver has enough driving hours available, the telephone dispatch call from the West Middlesex terminal may come at any time during the waiting period, and is unpredictable because of the nature of the demand for freight services. The driver may receive a call immediately after his 10 hour rest period ends, several days after his rest period ends, or at any time in between.

Further contributing to the unpredictability of the telephone dispatch call is the "hog" seniority system imposed by the industry-wide collective bargaining agreement. Under this system the driver with the most seniority, and possessing the necessary "off duty" hours, receives the next dispatch call irrespective of the time of his last call. It is possible, therefore, for a high seniority driver to get two or more dispatches before a driver at the bottom of the seniority list receives one.

The priority rights of "foreign" drivers is another factor contributing to the unpredictability of the telephone dispatch system. Under the concept of "foreign power courtesy," a driver from another Hall's terminal who has delivered a load to West Middlesex, is dispatched before any drivers domiciled at West Middlesex.

Because of the unpredictability of the telephone dispatch system, Hall's requires a high level of driver availability during the waiting period. "Log audit cards" are maintained by dispatchers at West Middlesex to record all incidents of driver non-availability. The audit card of a driver who is supposed to be available after the mandatory rest period is marked "busy" or "no answer" if the dispatcher fails to get through, and "absent" or "not home" or "not home will call" if someone other than the driver answers the phone, but that person does not affirmatively accept a dispatch call on behalf of the driver.

The discipline imposed for any of the forms of missed telephone dispatch calls varies with the frequency and

severity of the incidents. Missed dispatch calls are treated cumulatively, and a history of busy signals, no answers, driver non-availability when a call is completed, failure by a third party to accept a dispatch call, or failure to report to the terminal within two hours of receiving a dispatch, leads to progressively more severe forms of discipline. The forms of discipline begin with a letter of reprimand, then a suspension, then a threat of dismissal, and culminating, finally, in actual dismissal in the case of "chronic and habitual absenteeism."

"Chronic and habitual absenteeism" as grounds for dismissal is sanctioned by the industry-wide collective bargaining agreement and represents an accumulation of incidents of busy phone lines, no answers, driver non-availability if there is an answer, or failure by an answering third party to accept a dispatch on behalf of driver. If a driver believes he has been unfairly disciplined or that the charge of "chronic and habitual absenteeism" is groundless, he may invoke the grievance procedure of the industry-wide collective bargaining agreement.

Even apart from company-imposed discipline for missed telephone calls, there are strong economic incentives for drivers not to miss dispatches. Compensation and vacation time are tied to the number of "runs" a driver makes, with the result that a missed dispatch can be costly.

The unpredictability of the dispatch call and the two-hour reporting deadline, combined with the economic incentives which drivers have for not missing telephone dispatches, as well as the threat of discipline (and incidents of actual discipline) which follow missed telephone dispatch calls, tend to keep West Middlesex drivers close to their home telephones during the period when they are supposed to be available. Most drivers inform the dispatchers that they are to be reached at their home phones, and in fact most dispatch calls are received personally by the drivers at their home telephones.

One possible alternative to constant driver availability alongside the home telephone is for the driver to attempt to determine in advance when a dispatch call will come. The record shows that such driver-initiated dispatch inquiries are ineffective in freeing drivers from their home telephones because dispatchers are unable to predict when a load will be available for a particular driver.

Another alternative to personal availability alongside the home telephone—the use of secondary telephone contact points—does not permit drivers to pursue freely ordinary leisure time activity during the period when they are supposed to be available. To illustrate, a driver may want to use his off-duty time for a trip to a camping site where there are no telephones, or to see a movie or to eat at a fast-food restaurant where he cannot easily be paged. Or the driver may want to visit a regional shopping center where the use of multiple contact points is not feasible. Thus as a practical matter, the most that recourse to a secondary contact point means is that a driver may select one other phone to which he is tied, but the secondary contact point, like the primary contact point at home, must be within two hours distance of the West Middlesex terminal.

Hall's has not interferred with or discouraged the use of driver initiated dispatch inquiries or secondary contact points.

Apart from driver initiated dispatch inquires and the use of secondary contact points, the only other viable alternative to personal telephone availability identified on the record is the use of third party dispatches—that is, the acceptance of a dispatch by someone other than the driver. The availability and/or lack of availability of a third party dispatch procedure at West Middlesex was the main point of contention during the administrative hearings.

The record shows that Hall's does nothing positive to encourage the use of third party dispatches at the West Middlesex terminal. The only statement of company policy which relates to third party dispatches appears in a company bulletin dated August 5, 1975:

> If, for any reason, a driver is not going to be at the place normally called by the company when work is available, and no one else is available at that place to accept a work call for that driver, the driver is required to so notify the company so that, if a load does materialize, the driver can be reached and offered work.

Hall's interprets the August 5, 1975 policy statement as meaning that unless a third party specifically asks for a dispatch, and affirmatively represents that he or she is authorized to accept the dispatch, a third party dispatch will not be given, and the call will simply be recorded on the log audit card as showing that the driver was not available. Other trucking firms do not require the invocation of specific formulas before third party dispatches are given; the drivers merely inform these other companies once of the names of adult persons authorized to receive dispatches.

Neither the terms of the August 5, 1975 policy statement nor the interpretation of the policy statement are well known to the West Middlesex drivers or the members of the driver's family who would be the most likely recipients of those calls. Hall's third party dispatch procedure does not appear in the company's work rules nor do they appear in written dispatch instructions given to dispatchers although it is the practice of other carriers to have a written explanation of third party dispatch procedures.

The three dispatchers that testified concerning Hall's dispatch procedures were William Bullano, Edward Boyle, and Mary Kathryn Ebersole. Although each testified that

they had given dispatches to a third party, there was no one consistent method employed in making the third party dispatches. Dispatcher William Bullano testified that he gave dispatch information to third parties only if the third party indicated that immediate contact with the driver could be made for the purpose of informing the drivers to call Bullano. Upon promptly receiving a return call, Bullano would then give the dispatch to the driver.

Dispatcher Mary Kathryn Ebersole did not require that a third party specifically ask for the dispatch, but would not give the dispatch to a third party, even if it were asked for, unless that person could tell her where the driver was and when he would return, thereby assuring her that the driver would report to the terminal within the two-hour deadline. To Ebersole, who worked the night shift, a typical third party dispatch was an instance when the driver was asleep, the wife answered the phone, and Ebersole told her to wake her husband and send him to the terminal for a load. Dispatcher Edward Boyle would only give third party dispatches if the person answering the tellephone on behalf of the driver affirmatively requested that the dispatch be given. According to Boyle, third party dispatches were given infrequently.

The testimony of Louis Caccia, an employee of Hall's with twenty-one years of service, (11 of which have been spent at West Middlesex, and presently the shop steward at West Middlesex) shows that Hall's did not have a viable third party dispatch system. Caccia was called as a witness by Hall during the administrative hearings. Based upon the administrative law judge's observation of Caccia's demeanor, this Court adopts his findings that Caccia's testimony is entitled to a high degree of credibility. Caccia testified that he never received a third party dispatch; that the language of Hall's August 5, 1979 bulletin (i.e., the reference to someone else being "available . . . to accept a work call for (the) driver") does not indicate anything

to him about a third party dispatch system; and that in his view Hall's does not have a third party dispatch system. As shop steward, however, Caccia never made any suggestion to Hall's management respecting third party dispatchers, because, as he put it—

> Well, until recently, I never heard much about third party, which has been mentioned a few times. I never used to . . . I never known of anybody else that used it, unless just recently I heard them talk of it".

Since the dispatch call to the road driver may come at any time after the mandated rest period, the unpredictability inherent in the telephone dispatch system tends to produce driver fatigue. This is demonstrated by the fact that a driver may spend an entire evening waiting for a call from the dispatcher, then go to sleep only to be awakened soon afterward by the dispatcher. *The evidence is overwhelming that the unpredictable telephone dispatch system used by Hall's inevitably results in the dispatch of fatigued drivers.* (Emphasis supplied)

Further contributing to the fatigue problem, is Hall's work rule which provides that road drivers at West Middlesex are not permitted to "book-off" (i.e., remove themselves from the dispatch roll) at the time of receiving a dispatch call by reason of fatigue or for any other reason.

Prior to January 18, 1981, a "book-off" was available on the basis of one 24 hour "book-off" a week, but it had to be requested during the mandated ten hour rest period, and it had to be taken immediately after the rest period was over. The 24-hour "book-off" privilege could be lost if a driver missed a dispatch call or "booked-off" at any other time. In addition to the 24 hour "bookoff", prior to dispatch, a driver could request a "book-off" because of sickness or an emergency, but such a "book-off", too, would mean a loss of the 24 hour privilege.

Since the no "book-off" at dispatch rule has no exception for fatigue, drivers at West Middlesex believe if they are fatigued at the time of receiving a call but refuse to take a load, this is considered a violation of the company's work rules and the basis of a disciplinary proceeding. This belief is well-founded since drivers have been warned that "book-offs" for fatigue at time of dispatch are a violation of Hall's work and dispatch rules. Because of Hall's no "book-off" at dispatch rule, fatigued road drivers at the West Middlesex terminal do not report that they are fatigued when they receive a dispatch call, and routinely take dispatches while in this dangerous condition.

On January 18, 1981, new "book-off" rules were formally issued at West Middlesex. Drivers still may not "book-off" at the time of a dispatch call, but with the prior consent of a dispatcher, a driver who is supposed to be available for dispatch may "book-off" in advance of dispatch for brief periods of time because of fatigue or for any other reason. According to Hall's, "book-offs" are not permitted at time of dispatch because the carrier claims that it might be accused by the union or its employees of playing "position" for favored runs. That is to say, if a driver could "book-off" at will, this device might be used to pick and choose the runs that will be accepted and which will be rejected.

Curtis Galloway, Director for Industrial Relations for Hall's, as well as present and former dispatchers, testified that, (a) the company does not knowingly dispatch fatigued drivers, and (b) Hall's would allow a "book-off" if it were reported to the company at time of dispatch that a driver was fatigued. But Galloway admitted that if a driver should report that he was fatigued at the time of a dispatch call, this would be considered a violation of the company's work rules, and might be used against him in a disciplinary proceeding. Moreover, since Galloway acknowledged that the obvious purpose of the rule was to dis-

courage "book-off," and since he further admitted that he knew that driver fatigue was a problem, his statement that he did not know that the inevitable effect of the no "book-off" rule was to discourage drivers from reporting fatigue when called for dispatch is not credible. It is found as a fact that high officials of Hall's must have known that the no " 'book-off' at dispatch rule" results in fatigued drivers taking to the road.

Finally, with respect to "book-offs" it should be noted that neither the earlier system (one 24 hour "book-off" at end of the rest period and "book-offs" for emergency and sickness only) nor the January 1, 1981 reforms (unlimited short "book-offs") lessen the unpredictability of telephone dispatch calls. "Book-offs" of any kind excuse the driver from being available. When the driver is supposed to be available, he is still subject to the unexpected telephone call and the two-hour reporting deadline.

The NMFA contains in Article 45 a grievance and arbitration procedure by which the parties governed by the agreement agreed to resolve all grievances, complaints or disputes by submitting them to that grievance and arbitration procedure.,

The grievance procedure of the NMFA provides for the resolution of disputes, which cannot be resolved by the parties themselves, by joint committees composed of representatives of the unions and employers covered by the NMFA. The joint committees referred to in the NMFA are the Western Pennsylvania Joint Area Committee and the Eastern Conference Joint Area Committee (hereinafter "ECJAC"). The ECJAC is a body created by the NMFA and consists of an equal number of Eastern Conference of Teamster delegates and employer-representative delegates.

Article 16 of the NMFA which prohibits employers from requiring employees to violate government regulations in regards to safety, reads in pertinent part, as follows:

> Under no circumstances will an employee be required or assigned to engage in any activity involving dangerous conditions of work or danger to person or property or in violation of any applicable statute or court order, or in violation of a government regulation relating to safety of person or equipment. The term 'dangerous conditions of work' does not relate to the type of cargo which is hauled or handled.

The NMFA, therefore has made a violation of federal safety regulations a breach of the contract.

As a result of the dispatch procedures employed by Hall's, Plaintiff Gaibis, in his capacity as union steward, on November 11, 1977, filed a grievance on behalf of all drivers of Defendant Company at its West Middlesex operation pursuant to the grievance procedure as set forth in Articles 45 and 46 of the NMFA. The grievance in pertinent part is as follows:

> Details: For the past six (6) years, up to and including the present time, employee drivers have been required to be constantly 'available or in service on-call' to the Company between loads, immediately following the completion of the federal required statutory 8 hour 'off-duty' rest period, at the risk of discipline. These employee drivers have been, in addition, required to log this time as off duty, when in reality, and pursuant to federal laws and regulations, this time should be logged as 'on duty not driving' and should be compensibe (sic). This is true because the drivers are literally required to be immediately available and must wait for work calls.
>
> Adjustment Requested: Regulate work week, or do not require availability, or permit this time to be com-

pensible. In addition, employees request back pay for all past time which they were required to log as off duty, when in fact they were 'in service on duty not driving.'

The grievance was processed at a meeting of the Western Pennsylvania Teamsters and Employers Join Area Committe and the result was a deadlock, thus causing an appeal to be taken to the "ECJAC".

The grievance was heard before the ECJAC on April 26, 1978, case no. R-90-78, at which time the Defendant Hall 'claimed the case was improperly before the committee as it was not subject to the grievance procedure and unrelated to the contract. Approximately one week later, on or about the early part of May, 1978, Plaintiff was notified that the ECJAC had sustained the company's position and dismissed the grievance by making the following decision:

"The panel in executive session, motion made, seconded and carried this case is improper (sic) before this Committee. No cost."

On or about January 4, 1978, a letter was sent to Plaintiff Lowry from Defendant Hall's suspending him for three days without pay for being "unavailable for dispatch", because he was not home on several occasions when he was "off duty" and called by Defendant Hall's. On or about January 10, 1978, a grievance was filed by Plaintiff Lowry charging that his suspension for "non-availability" was illegal and improper. After a deadlock on said grievance before the W. Pa. Teamsters & Employers Joint Area Committe, the grievance was appealed to the ECJAC.

The grievance was heard before the ECJAC on July 25, 1978, case no. R-90-78 and approximately one week later,

Plaintiff Lowry was informed that the ECJAC had upheld his suspension with the following decision:

"The panel in executive session, motion made, seconded and carried that based on the fact that Lowry was suspended for just cause, the claim of the union is denied. Cost to union."

On or about January 29, 1979, Plaintiff Lowry was discharged by the Defendant Company for "chronic and habitual absenteeism." A grievance was filed by the Union and subsequently decided by the Western Pennsylvania Teamsters and Employers Joint Area Committee (hereinafter WPTEJAC) on February 15, 1979, reinstating Plaintiff Lowry without back pay, and ordering the Defendant Company and the Union to settle the method of notifying the drivers of work opportunities.

On or about March 1, 1979, the Defendant Hall's in less than two weeks after Plaintiff Lowry was ordered reinstated, again discharged Lowry for "chronic and habitual absenteeism" based on a five or six day period of time. As a result of the March 1, 1979 discharge of Plaintiff Lowry for non-availability, the Defendant Company and the Union once again went through the grievance procedure and again, on August 29, 1979, the arbitrator ordered Plaintiff Lowry reinstated but without back pay.

On or about December 7, 1979, the Plaintiff Lowry received a letter from the Defendant Company dated December 4, 1979, informing him that once again he was being discharged for not being by his phone while "off duty" or "chronic and habitual absenteeism" as the Defendant Company called it.

On January 11, 1980, an arbitration hearing was held on the most recent discharge of Plaintiff Lowry and on January 14, 1980, the arbitrator issued an opinion upholding the discharge.

Plaintiff David Gaibis was notified by Hall's on May 2, 1980, that he was being discharged for chronic and habiutal absenteeism. This "chronic and habitual absenteeism", as has been the case on all other occasions when this phrase has been used relative to the matters raised herein, relates solely to "off duty" time.

A grievance was filed by the union on behalf of Plaintiff Gaibis on May 7, 1980, challenging his discharge as being illegal and in violation of the collective bargaining agreement. A hearing was held on the same date before the "WPTEJAC" at which time the discharge was upheld, without opinion.

Both of the named Plaintiffs, Gaibis and Lowry, were discharged as a result of the same alleged illegal dispatch procedure challenged in their Complaint. Other employees of Defendant Hall's who are similarly situated as Plaintiff Gaibis and Plaintiff Lowry, have been and continue to be suspended for alleged "non-availability" or "chronic and habitual absenteeism."

As a result of the discipline and threats of discipline by Defendant Hall's, Plaintiffs and others similarly situted were, in most cases, forced to remain home and be continuously and absolutely available for dispatch calls from the Defendant Hall's having no idea when the calls might come. Plaintiffs and others similarly situated logged said time as off duty only because Defendant Hall's required them to so log the time at the risk of discipline.

Discussion and Conclusions

Logging and Dispatch Procedure

In certifying the question related to the transportation issues in this litigation the court's objective was to gain the bnenefit of the BMCS's views before rendering a final

judicial decision. The primary jurisdiction doctrine allows the court, where a claim is orginally cognizable, to stay the procedings before it, maintain jurisdiction and certify the relevant issues to an administrative agency with special competence so the court may avail itself of the agency's expertise. *Driving Force, Inc. v. Manpower, Inc.,* 538 F. Supp 57 (D.C. Pa. 1982); *Levitch v. Columbia Broadcasing System, Inc.,* 495 F. Supp. 649 S.D. N.Y. 1980)

This Court never relinquished its jurisdiction in this matter, and so stated in its Order of April 27, 1981, that certified the question to the administrative agency. By invoking the primary jurisdiction doctrine this Court will now be able to take full advantage of the BMCS's expertise in reaching a final decision.

While the Court recognizes that the BMCS and its reviewing officials have special competence in matters pertaining to the regulation of the trucking industry, this court is not bound by the decisions rendered as a result of the administrative process. There being no material factual disputes between the parties, the sole contention is the construction of the BMCS regulations as they pertain to the road drivers computation of their hours of service.

It is clear that when a decision turns on the meaning or construction of words in a statue or regulation, as in this case, then a legal question is presented for the court to decide. *International Society for Krishna Consciousness, Inc. v. Rochford,* 425 F. Supp. 734 (N.D. Ill. 1977), *aff'd* in part, reversed in part 585 F.2d 263 (7th Cir. 1978).

Accordingly, this court, though mindful of the beneficial views of the administrative agency, has the duty to construe the BMCS regulations in making a final decision, and is not bound by the decisions rendered through the administrative process. At most the court is required to give what it deems to be "appropriate weight" to the decisions rendered by the BMCS and its reviewing offi-

cials. *International Ass'n of Heat and Frost Insulators and Asbestos Workers v. United Contractors Association,* 483 F.2d 384 (3rd Cir. 1973), amended, 494 F.2d. 1353 (3rd Cir. 1974).

As the Supreme Court directed in *Bread Political Action Committee v. Federal Election Commission,* 455 U.S. 577, 102 S. Ct. 1235 (1982), a court must begin its analysis of an isue of statutory construction with the plain language of the statute itself. Administrative regulations, for construction purposes, are treated no differently than statutes and the same rules of construction are applicable in both instances. *Rucker v. Wabash Ralilraod, Co.,* 418 F.2d 146 (7th Cir. 1969), *New Ikor, Inc. v. McGlennon,* 446 F. Supp. 136 (D.C. Mass. 1978). The plain language of the regulations and the ordinary meanings of the words therein are the starting points in construing the regulations and will be determinative unless there is an apparent ambiguity or expression of legislative intent to the contrary. *Bread Political Action Committee,* 455 U.S. at 580.

The regulations in question that the Court must construe defines "on duty" time as it applies to the time spent by road drivers waiting for dispatch calls after the mandatory rest period. Up until the final decision rendered by the Associate Administrator for Safety, (as a result of this Court's request for guidance), on-duty time was defined as "[all] time from the time a driver begins to work or is required to be in readiness to work until the time he is relieved from work and all responsibility for performing work." FMCSR § 395.2(a).

The definition of on duty time contained in the regulation has been interpreted, officially and unofficially, by the FHWA. The official interpretation is contained in the document published in the Federal Register on November 23, 1977, 42 Fed. Reg 60078, Nov. 23, 1977. The interpretation states:

> The purpose of this rule is to allow the driver opportunity to obtain adequate rest. This means that he must be relieved of all responsibility from work and be free to use the time effectively for his own purposes during the specified period of time.
>
> "When a driver is required by a motor carrier to personally stand by to receive a telephone notice to report to work, following a required off duty period, and the driver does in fact stand by, he meets the requirements of § 395.2(a) and such time must be logged as on duty time."

A number of unofficial interpretations have been issued concerning telephone availability. One informal interpretation issued to Mr. Gaibis on September 22, 1977, states that a driver is on duty if the company requires him to personally be present at a particular point with no option to have someone else receive the message for him and no option to change the contact point. A similar interpretation was issued by former Federal Highway Administrator Bowers on July 13, 1979. Mr. Bowers said [a] driver is not considered to be on duty if a third party may take a message for him, or if he is free to move around, but must keep the carrier notified as to where he can be reached."

On March 29, 1982, the Associate Administrator for Safety issued a new interpretation of the regulation overruling the prior interpretations of the regulation. The new interpretation stated that "[i]f the employer generally requires its drivers to be available for call after a mandatory rest period which complies with the regulatory requirement, the time spent standing by for a work related call, following the required off-duty period, may be properly recorded as off-duty time." The reasoning offered by the Administrator was that since the freedom to rest is the objective purpose of the FMCS regulations, "[t]he fact that a driver must also be available to receive a call

in the event the driver is needed at work, even under the threat of discipline for non-availability, does not by itself impair the ability of the driver to use this time for rest."

The plain language of the regulation defining on-duty time expressly includes the factual situation where a driver is "required to be in readiness to work". The official interpretation of the regulation issued in November of 1977, acknowledges that when a driver is personally required to stand by to receive a dispatch call, the driver meets the requirements of being on-duty under the regulation. This interpretation of the regulation comports with the ordinary meaning of the words "in readiness to work". As long as the road driver is personally required to be at a particular site after the mandatory rest period so the dispatcher can contact the driver for a work assignment, the time spent waiting for the dispatch call is on duty time as defined in the FMCSR at 395.2(a).

The unofficial interpretations of the regulation suggest that if the road driver was allowed to change contact points where he/she could receive the dispatch calls, then the time spent waiting would not be considered on-duty time. This Court disagrees with this conclusion because the site where the driver receives the dispatch call does not alter the factual situation of a driver being personally at a contact point waiting for the dispatch call. Where the driver is personally required by the Defendant to stand by at any contact point to receive a dispatch call, he/she is waiting in readiness to work and therefore this time should be logged as on-duty time according to the plain language of the regulation.

Hall's could have employed alternative methods for contacting its road drivers for work assignments rather than have its drivers personally stand-by to receive dispatch calls. A working third party dispatch procedure is such an alternative. The facts in this case establish that Hall's

has not adopted an alternative dispatch procedure that is utilized in any systematic or consistent pattern as part of the company's practice or procedure.

The evidence presented in the administrative hearings does not support Hall's contention that it had established a working third party dispatch procedure that relieved the road drivers of the responsibility of personally waiting for dispatch calls.

The lack of a viable alternative dispatch procedure, such as the third party dispatch procedure, when combined with Hall's policy of requiring its drivers, under the threat of disciplinary action, to log the time they personally spent waiting for a dispatch call as off duty time amounts to a violation of the FMCSR at 49 CFR 395.8. Hall's is in violation of 49 CFR 395.8 because it unlawfully requires its road drivers to improperly log their time as "off duty" when said time should be logged as "on duty". Where the company requires the drivers to personally wait by the telephone for a dispatch call and the driver does in fact wait for a work call, the time spent waiting must be logged as on duty time for which the driver must be compensated. If the driver is not personally required to stand by to receive the dispatch call, he/she is considered to be relieved from work and relieved of all responsibility for performing work and is free to use the time effectively for his/her own purposes.

This Court must also consider another FMCS regulation, 49 CFR 392.3, to determine if Hall's dispatch procedures violate the provisions concerning the safe operation of a motor vehicle by the road driver. That regulation prohibits a driver from operating or a motor carrier from requiring or permitting a driver to operate a motor vehicle while the driver's ability or alertness is so impaired through fatigue, illness, or any other cause, as to make it unsafe for him to begin or contnue the operation of the motor vehicle.

49 CFR 392.3. This Court concludes that Hall's has violated FMCS regulation § 392.3 by virtue of its work rule and practice that a driver may not "book off" at the time of dispatch. This Court adopts the reasoning of the Administrative Law Judge, as set forth below, to support its determination that a violation of 49 CFR § 392.3 has occurred.

FMSCR § 392.3 emphatically prohibits the dispatch of fatigued drivers irrespective of the cause and notwithstanding the role which the drivers themselves may play in producing this dangerous condition. The position of BMCS on this point is clear:

> Regulations cannot provide a complete solution to the problem of driver fatigue and its effect on safety of operations. The manner in which a driver may spend his time off duty is beyond the scope of the FMCSR, although some of his off-duty activities may tire him as much as any work for his employer. The responsibility is the driver's to assure himself of adequate rest and sleep. Likewise, it is the employer's responsibility to establish and apply effective management techniques to ensure that drivers are not dispatched in a fatigued condition, nor that off duty rest is not routinely disturbed by notifications for reporting for the next tour of duty.

Hall's argues that because the drivers do not report fatigue at time of dispatch, it has no knowledge of this condition, but had the company been properly apprised, "book offs" for fatigue would have been allowed. This argument is not convincing. For one thing, the drivers who appeared in [the administrative] proceeding, whether called by Gaibis and Lowry or Hall's, testified that they do not report their fatigued condition when a dispatch call is received for the very reason that "book offs" at that time for any reason are not allowed. Second, considering

the fact that Hall's knew that operator fatigue was a problem, and yet it explicitly warned drivers that "book-off" for this reason at time of dispatch was a violation of the company's work rules, it is fair to conclude that whatever gaps exist in the company's lack of knowledge about specific incidents of fatigue are largely of the company's own making. Besides, even if it were believable that Hall's had no knowledge that fatigued drivers generally were being dispatched (which is contrary to [the] specific finding that high company officials must have known the consequences of its no "book-off" rule), it is significant that FMCSR § 393.3 does not adopt a "knowingly permit" standard—its says "a motor carrier shall not require or permit" the dispatch of a fatigued driver. Since this is a safety regulation, which should be liberally construed, *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980), "permit" in this context should be read as meaning that the carrier may not create a condition which makes the forbidden conduct possible. This is precisely what Hall's has done with its no "book-off" rule.

In addition to the direct prohibition against permitting fatigued drivers to operate a motor vehicle, FMSCR § 390.32 requires carrier "observance" of all safety rules including § 392.3. Contrary to the standard definition, Hall's defines "observance" to mean closing its eyes and doing nothing about the obvious fatigue problem. Certainly, it is the exact anti-thesis of a safety regulation for a carrier to establish work rules which arbitrarily assume that drivers will not be fatigued at time of receiving a dispatch and thereby discourages drivers from reporting their true condition should they in fact be fatigued. Finally, "observance" minimally connotes that a carrier knows what apparently every driver in the industry knows—namely, that by prohibiting "book offs" at dispatch time it is permitting fatigued drivers to take to the road.

Arbitration Awards

At the outset the Court acknowledges the stringent standard of review that limits the Court's role in considering an arbitrator's award. Where the parties have entered into a collective bargaining agreement that adopts arbitration as the method of dispute resolution, as in this case, "it is the arbitrator's construction of the contract which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the Courts have no business overruling it because their interpretation of the contract is different from his." *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 1593, 599 (1960). The arbitrator in making an award is bound by the terms of the collective bargaining agreement and the award rendered is legitimate only so long as it draws its essence from the agreement. *United Steelworkers of America v. Enterprise, Supra; Mobil Oil Corp. v. Independent Oil Workers Union*, 697 F.2d 299 (3rd Cir. 1982).

The Third Circuit has further emphasized that the reviewing court is to give great deference to an arbitrator's award and may only disturb the award where there is a manifest disregard of the collective bargaining agreement, totally unsupported by principles of contract construction and the law of the shop. *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123 (3rd Cir. 1969). It is clear that this Court's review of the arbitrator's award is narrow and the award may not be disturbed because this court would have construed the bargaining agreement in a different manner.

A reviewing court may under certain circumstances however may vacate an arbitration award despite the limited standard of review. The court in *Ludwig* listed several circumstances that would warrant an arbitrators award being overturned. Two of those circumstances are relevant in this case: First, where the award violates specific com-

mand of some law and, second, where the award is inconsistent with public policy. 405 F.2d 1128-1129 n.27.

In light of this court's earlier discussion and conclusion that Hall's dispatch and logging procedure violates the FMSCR, as it relates to the proper logging of on-duty time and that said improper logging procedure ignores the fatigued condition of its drivers by encouraging said tired drivers to go out on the road, it necessarily follows that the arbitrator's awards upholding the validity of Hall's dispatch and logging procedure are inconsistent with the government regulations and violate the public policy underlying the regulations. The awards rendered by the arbitrators and challenged by the plaintiffs in this action will be vacated because the awards violate the specific command of the FMCSR and are inconsistent with the public policy of the FMCSR to promote safe and proper use of the highways by road drivers. *Kane Gas Light & Heating Co. v. International Br. of Firemen*, 687 F.23 673 (3rd Cir. 1982).

STATUTE OF LIMITATIONS

Defendant Hall's contends that the Plaintiffs' claim are barred by the statute of limitations because the original complaint in this civil action was not filed until October 23, 1978, considerably after the applicable three month statute of limitations, 5 P.S. § 173, for actions to vacate an arbitrators award had expired. The Court concludes that the Plaintiffs claims are not time barred because the October 23, 1978 Complaint was filed within the three month statutory period following the arbitration award dated July 25, 1978, which upheld the suspension of Plaintiff Lowry.

Since the identical issues, i.e., Plaintiffs' challenging the validity of Hall's logging and dispatch procedure, are involved in each of the arbitration awards in this litigation,

the Court can properly adjudicate all of the claims since the Plaintiffs' timely filed their complaint seeking to vacate the July 25, 1978 arbitration award before the three months period had expired. Furthermore, both Plaintiffs, Gaibis and Lowry, promptly filed applications for preliminary injunctions invoking this Court's jurisdiction after they were discharged challenging the awards that upheld their terminations under Hall's dispatch and logging procedure. Gaibis filed for a preliminary injunction the same day he received notice of the arbitration award, and Lowry filed for a preliminary injunction within two weeks after he received notice of the award upholding his discharge.

FAIR LABOR STANDARDS ACT

Plaintiffs have alleged that Defendant Hall's has violated the Fair Labor Standards Act because they and other road drivers similarly situated are not being paid for time spent working for Hall's that is logged as off duty time under the company's logging procedure when such time is in fact on-duty time for which they should be compensated. The Court agrees with the Defendant that the two relevant provisions of the Fair Labor Standards Act that could apply in this action are 29 U.S.C. §§ 206 and 207.

Section 206 sets the minimum wages an employer shall pay an employee who in any work week is engaged "in commerce . . . ." The Plaintiffs' Complaint does not allege that the total weekly wage paid by Hall's fails to meet the minimum weekly requirements provided for under the statute which would be a violation of Section 206. The general statement that Hall's has violated the Fair Labor Standards Act by virtue of its dispatch and logging procedure is not enough to establish a claim for an employers violation of the minimum wages provision of the Act. Plaintiffs have not plead sufficient factual allegations to support their entitlement to relief under Section 206 of the Act. The Plaintiffs have not properly stated a claim under § 206

because they have failed to state with particularity how Hall's has violated the minimum wage provision of the statute.

As to Section 207 of the Act, which establishes the maximum number of hours an employee can work, the Plaintiffs cannot properly establish a claim to relief under this section because Defendant Hall's is exempt from the provisions of Section 207. Defendant Hall's is exempt from Section 207 because Plaintiffs are over-the-road drivers subject to maximum hours of service regulations set by the Secretary of Transportation pursuant to the provisions of 49 U.S.C. § 304. *Morris v. McComb,* 332 U.S. 422, 92 L Ed. 44 (1947); *Brennan v. Schwerman Trucking Co.* 540 F.2d 1200 (4th Cir. 1976), 29 U.S.C. § 213(b)(1).

Plaintiffs cannot, in light of the statutory exemptions, properly state a claim upon which relief can be granted under section 207 of the Fair Labor Standards Act.

JUDGMENT AND ORDER

AND NOW, this 6th day of JUNE, 1983, based upon the foregoing findings of fact and conclusions of law, IT IS ORDERED, ADJUDGED and DECREED the following:

1. Defendant's Motion for Summary Judgment is denied except for that part of the Motion which addresses Plaintiffs' claim under the Fair Labor Standards Act. Defendant is granted partial Summary Judgment in that Plaintiffs have failed to properly state a claim upon which relief can be granted under the provisions of the Fair Labor Standards Act.

2. All arbitrator's awards which have heretofore upheld the validity of the Defendant's dispatch and logging procedures as hereinabove discussed are here and now vacated.

3. All arbitrator's awards that have heretofore upheld the discharge of and the disciplining of Plaintiffs Gaibis, Lowry and others similarly situated for "non availability", and/or chronic and habitual absenteeism arising out of the Defendant's rule requiring the Plaintiffs and the Plaintiff-class to be in continuous readiness for work while they are off-duty are here and now vacated.

4. The Defendant is here and now permanently enjoined from requiring the Plaintiffs and the Plaintiff-class to be continuously available for work while they are off duty and especially during the hours required for their proper rest.

5. The Defendant may formulate reasonable rules requiring Plaintiffs and the Plaintiff class to be in continuous readiness for work while waiting for a dispatch under the following conditions:

a) That a driver who is off duty shall not be required to be available for readiness to work until he has had eight consecutive hours of off-duty time, and has "booked on" on as being available for work, and

b) That once a driver is "booked on" as being available for service, even though he is not on the Defendant's premises, he shall be paid the applicable hourly rate pursuant to to the collective bargaining agreement for all hours spent in continuous readiness for work if at the request of the Defendant employer, the said driver is instructed by the Defendant's dispatcher to stand by until called. When a driver receives a "stand-by" instruction he will log "in service, on duty, not driving".

6. That Plaintiffs and all others similarly situated who have lost time by suspension and/or discharge as hereinabove referred to, shall be compensated for all lost wages that would have been paid to them for on duty time pursuant to the collective bargaining agreement, but for said

disciplinary action of Defendant. The Plaintiffs and the Plaintiff- class shall not be paid for the hours heretofore spent off active duty while waiting for a call from the Defendant for a dispatch in service for the reasons set forth in the opinion annexed hereto, and for the further reason that said time due to a obvious lack of a uniform and accurate system of recording, would be impossible to accurately calculate. An award to Plaintiffs for this time lost while waiting to be called in the past, would be at most speculative and conjectural.

7. Defendant is permanently enjoined from disciplining, suspending, and/or discharging any of its drivers including the Plaintiffs and the Plaintiff-class, for "booking off" at the time of dispatch, if, in the opinion of said drivers they are fatigued, ill or otherwise physically unable to safely perform their driving duties. Any "in service on duty not driving time" logged by such driver immediately prior to "booking off" because of fatigue, illness and/or other physical disability shall not be compensable.

8. This Court will entertain within ten (10) days of this date a Petition from the Plaintiffs requesting an award for costs and reasonable attorneys' fees. After Defendant has answered said fees and cost petition within ten days of filing the same, a hearing will be held in regard to said petition on July 11, 1983, at 3:30 o'clock, P.M., E.D.S.T., in Court Room No. 5, United States Post Office and Court House, Pittsburgh, Pennsylvania.

/s/ PAUL A. SIMMONS
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5468

(C.A. No. 78-1211)

CAROL JEAN VOSCH, Executrix of the
Last Will of Charles Lowry, deceased
DAVID GAIBIS and others similarly situated,

v.

WERNER CONTINENTAL, INC.,
Appellant

SUR PETITION FOR REHEARING IN BANC

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, *Circuit Judges*, and KELLY, *District Judge**

The petition for rehearing filed by Appellees in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all other available circuit judges in the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the Court in banc, the petition for rehearing is denied.

By the Court,
/s/ ARLIN M. ADAMS
Circuit Judge

Dated: Jun 29 1984

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* As to panel rehearing only.

[Received and Filed 6-29-84 Sally Mrvos Clerk]